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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1969

No. 1127

LEO WEISS, *Petitioner*

v.

STATE OF WYOMING, *ex. rel.*
G. JOSEPH CARDINE, *Respondent*

BRIEF FOR RESPONDENT IN OPPOSITION FOR AN APPLICATION FOR A WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the Wyoming Supreme Court which is the basis for the Application for the Writ of Certiorari is reproduced in its entirety beginning at page 19 of Petitioner's Brief.

JURISDICTION

The jurisdictional requisites relied upon by Petitioner are set forth in his Brief appearing at page 2. Specific reference is made to Title 28, United States Code, Section 1257, subsection 3, which specifically states that the Supreme Court of the United States may review final judgment or decisions rendered by the highest court of the state by Writ of Certiorari. It is the Respondent's position that the six issues presented to this Court for review, found in Section C commencing at page 3 of Petitioner's Brief, are not of such a nature as to lend themselves to review by the United States Supreme Court pursuant to Title 28,

Section 1257, subsection 3. Specifically, issues C(1), C(2), C(3), C(4), and C(6) are issues that were specifically reviewed by the Wyoming Supreme Court and decided upon non-federal grounds. Because of this, they are not subject to review by this Court at this time. (See *Beck v. Washington,* 369 U.S. 541, 549 (1962), also *Supreme Court Practice,* 4th Edition, Stern & Gressman, Section 3.25 *et seq.,* p. 116). Each of the following issues presented to the Wyoming court were reviewed and decided solely on non-federal grounds in light of the Wyoming Constitution.

I.

SECTION 6-247, *et seq.,* WYOMING STATUTES 1957 (CUM. SUPP. 1967) CONTAIN MORE THAN ONE SUBJECT AND ARE IN VIOLATION OF SECTION 24, ARTICLE 3, CONSTITUTION OF THE STATE OF WYOMING.

II.

THE APPELLANT IS GUARANTEED UNDER THE TERMS OF THE WYOMING STATE CONSTITUTION A JURY TRIAL IN A CONTEMPT PROCEEDING INITIATED PURSUANT TO SECTION 6-254, WYOMING STATUTES 1957 (CUM. SUPP. 1967).

III.

A CONTEMPT PROCEEDING INITIATED PURSUANT TO SECTION 6-254, WYOMING STATUTES 1957 (CUM.

SUPP. 1967), DOES VIOLATE THE TERMS AND PROVISIONS OF SECTIONS 6 AND 7, ARTICLE 1, CONSTITUTION OF THE STATE OF WYOMING, IN THAT THE APPELLANT WAS DENIED LIFE, LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW, AND THERE WAS MANIFESTED ABSOLUTE AND ARBITRARY POWER OVER THE LIFE, LIBERTY OR PROPERTY OF APPELLANT.

IV.

THE APPELLANT WAS DENIED HIS RIGHT OF DISCOVERY OR OTHER APPROPRIATE PROCEDURES IN THE CONTEMPT PROCEEDINGS, FURTHER HE WAS DENIED PROPER NOTICE OF HEARING AND ALSO WAS DENIED LIFE, LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF THE LAW.

It is clear from these arguments presented to the Wyoming Supreme Court, when read in conjunction with its opinion (Petitioner's Brief, p. 19), that each is non-federal in nature and is not subject to review by this Court in a Certiorari petition.

In analyzing issue C(5), which deals with the seizure of evidence based upon the holding of *Chimel v. California,* U.S. No. 770 (6-23-69), it is the Respondent's position that the highest court in the state must consider the specific federal question prior to consider-

ation by the United States Supreme Court. *Adler v. Board of Education,* 342 U.S. 485, 496 (1951) and *Whitney v. California,* 274 U.S. 356, 363 (1926). (See also *Supreme Court Practice,* 4th Edition, Stern & Gressman, Section 3.30, p. 131.)

This search and seizure question raised in light of *Chimel* was not properly presented to the Wyoming Supreme Court for review even though raised at the trial court level. Not having had an opportunity to review the record filed with this court, the state is at a handicap to determine whether or not the Briefs of the Petitioner and Respondent which were presented to the Wyoming Supreme Court have been incorporated for the Court's review; however, these Briefs clearly indicate that this search and seizure question now urged upon this Court was not presented to the Wyoming court for review. Based upon the Wyoming cases of *Valerio v. State,* 429 P.2d 317, 319 (Wyo. 1967) and *Lujan v. State,* 423 P.2d 388, 390 (Wyo. 1967), it is clear that issues raised at the trial level will not be reviewed by the Wyoming Supreme Court unless briefed and argued by counsel.

Further, it is the Respondent's position that since *Chimel* has not been held retroactive by this Court, it has no application in this case since the questioned arrest and search are pre-Chimel in nature, occurring in December of 1967.

QUESTIONS PRESENTED

The questions presented for consideration by this Court in contemplation of the issuance of the Writ of Certiorari are stated at pages 3 and 4 of Petitioner's Brief. It is clear in reading these statements in con-

nection with the Wyoming Supreme Court decision appearing at page 19 of the Petitioner's Brief that the grounds for issuance of the Writ do not have merit in that they are not properly reviewable issues presented to this Court as set out in the Respondent's Jurisdictional claims.

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The Respondent is somewhat at a loss to state with certainty as to whether or not the proper and pertinent United States Constitutional citations have been incorporated in the Petitioner's Brief.

STATEMENT OF CASE

The Petitioner's Statement of Case is found in Section E commencing at page 12 of his Brief. It is the Respondent's feeling that the Court needs additional facts upon which to better analyze the proceedings that are now before this Court for review. Therefore, in fairness to the Court, the following chronological facts, times and record references are set forth. It is noted that the record citations referred to relate to page numbers that were used in the record presented to the Wyoming Supreme Court for its review.

1. This case is an appeal from a contempt order issued by the Wyoming District Court of the Seventh Judicial District on April 5, 1968 (R. 181). A contempt proceeding heard before the court April 2, 1968 (R. 400 *et seq.*) arose from a deliberate violation of an injunction entered by the court on March 8, 1968 (R. 56).

2. Prior to entering the injunction which Petitioner violated, the County and Prosecuting Attorney

for Natrona County, Wyoming, under oath, filed a Petition for Order of Abatement against Petitioner on December 18, 1967 (R. 4). This proceeding was initiated under the provisions of Sections 6-247 through 6-255, Wyoming Statutes 1957 (Cum. Supp. 1967). In the Petition for Order of Abatement, it is alleged that the Petitioner, who is the record title owner of certain described property, had maintained, used and occupied such premises for the purposes of prostitution and illegal sale of intoxicating liquor. Such activities constitute a nuisance under the terms of the statute and should be enjoined (R. 4).

3. Summons and Petition for Abatement were served upon Petitioner (R. 7) pursuant to the Wyoming Supreme Court holding in *Weiss v. State*, (Wyo.) 435 P.2d 280, 281 (1967). A hearing was held and a temporary injunction was issued January 12, 1968 (R. 27) enjoining the Petitioner from maintaining a house of prostitution and selling liquor without a license on the particularly-described premises. Such injunction was served upon Petitioner January 12, 1968 (R. 28).

4. An untimely answer was filed by Petitioner on January 15, 1968 (R. 32), and due to such untimely filing of the answer, the Clerk of the District Court entered a default on January 16, 1968 (R. 31).

5. This entry of default was set aside by order of the court upon good cause shown on January 29, 1968 (R. 43).

6. A Proceedings by Information alleging violation of the temporary injunction by Petitioner was filed February 2, 1968 (R. 44). Based upon the Pro-

ceedings by Information, a warrant for the arrest of Petitioner was issued February 2, 1968 (R. 48).

7. After hearing in open court on February 14, 1968, the court found the Petitioner guilty of violation of the temporary injunction issued January 12, 1968 (R. 53-54). As a result, Judgment and Decree was rendered on March 8, 1968, finding the Petitioner in contempt for violating the temporary injunction in that he did, subsequent to the injunction, maintain and use the certain described premises for the illegal sale of liquor without a license or for the purpose of prostitution. The Petitioner was further enjoined from maintaining, using or permitting to be used the described premises for the illegal sale of liquor without a license, or for the purpose of prostitution, either directly or indirectly. (R. 56, 57, 58)

8. Based upon this Judgment and Decree, the Petitioner filed Notice of Appeal to the Wyoming Supreme Court on March 8, 1968 (R. 60).

9. By order of the Wyoming Supreme Court on September 20, 1968, the Appeal filed was dismissed (Case File No. 3706).

10. A second Proceedings by Information was filed by the County and Prosecuting Attorney on March 11, 1968 (R. 64) alleging the Petitioner had violated the terms and conditions of the Judgment and Decree entered by the court on March 8, 1968. Service was made upon Petitioner on March 11, 1968 (R. 86).

11. An Amended Proceedings by Information was filed before the court against Petitioner on March 21, 1968 (R. 141, 142, 143) and the Amended Proceedings

by Information was served on March 22, 1968 (R. 156).

12. A contempt trial was held before the court on April 2, 1968 (R. 400 *et seq.*) based on the alleged contempt by Petitioner of the injunction issued by the court. The court found, on April 5, 1968 (R. 181, 182), that Petitioner had *deliberately, flagrantly,* and *knowingly* violated the injunction of the court on March 8, 1968, and the court ruled that Petitioner be fined the sum of $1,000 and sentenced to a term of 90 days; and further, that the Information filed in the case against Petitioner was sufficient for the purpose of the action; and that any motions Petitioner may have made with respect to such Information were overruled.

13. As a result of the contempt finding, the Petitioner filed a Notice of Appeal with the Wyoming Supreme Court on April 8, 1968 (R. 186).

14. As a result of the Notice of Appeal filed with the Wyoming Supreme Court, the court issued a decision on June 29, 1969, which is found at page 19 of Petitioner's Brief.

15. The basis of the Petition for Certiorari before this Court is an outgrowth of decision of the Wyoming Supreme Court upholding the contempt order of the District Court.

16. Petitioner then filed a petition for rehearing before the Wyoming Supreme Court, which petition was denied on September 19, 1969.

17. The Wyoming Supreme Court opinion and mandate were returned to the Wyoming District Court on October 22, 1969.

18. Pursuant to Rule 22, Rules of the United States Supreme Court, the Petitioner had ninety days or up to January 20, 1970, to file appropriate petition, record and brief with this Court to invoke its jurisdiction. However, on the ninety-first day, January 21, 1970, Associate Justice White entered an order extending time in which to do so for the benefit of Petitioner to February 4, 1970.

REASONS FOR DENYING THE WRIT

Contrary to Petitioner's statement that the Writ should be allowed pursuant to Rule 19 of the Rules of the United States Supreme Court, it does not appear that the highest court of the State of Wyoming has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's powers of supervision. It is clear in this case that the state Supreme Court decision was based on non-federal grounds and that such grounds are adequate to support the court's decision. Based upon this, coupled with the jurisdictional challenges raised, the Respondent submits that a Writ of Certiorari should not be issued to review the judgment and order of the Wyoming Supreme Court in this case.

Respectfully submitted,

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